Supreme Court, U.S.
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Docket No.

UNITED STATES SUPREME COURT
OCTOBER 1998 TERM

SAMMIE BARMAN DELAUNE, Estate; DENISE LOVELESS, Co-Executors and Transferees of the Estate of Sammie Barman Delaune; MAE ACY AMEDEE, Co-Executors and Transferees of the Estate of Sammie Barman Delaune; WILLIAM R. SMITH, JR., Transferees of the Estate of Sammie Barman Delaune; PHYLLIS ROBIRA ZAPP, Transferees of the Estate of Sammie Barman Delaune; BERTHA THOMAS, Transferees of the Estate of Sammie Barman Delaune; JANE LEE VAN REENEN, Transferees of the Estate of Sammie Barman Delaune; JOYCE B. METCALF, Transferees of the Estate of Sammie Barman Delaune; PEGGY ANN GEILER, Transferees of the Estate of Sammie Barman Delaune; SAMUEL BUCKMASTER, JR., Transferees of the Estate of Sammie Barman Delaune

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Is an estate a taxpayer with standing under the Federal Tort Claims Act to seek a refund of estate taxes erroneously and illegally assessed to the estate when the taxes are paid by the transferees of the estate's assets?

LIST OF ALL PARTIES

The following is a list of all named parties in the action below:

Estate of Sammie Barman Delaune - Petitioner;

Denise Loveless, Co-executor and Transferee of the Estate of Sammie Barman Delaune - Petitioner;

Mae Acy Amedee, Co-executor and Transferee of the Estate of Sammie Barman Delaune - Petitioner;

William R. Smith, Jr., Transferee of the Estate of Sammie Barman Delaune;

Phyllis Robira Zapp, Transferee of the Estate of Sammie Barman Delaune;

Bertha Thomas, Transferee of the Estate of Sammie Barman Delaune;

Jane Lee van Reenen, Transferee of the Estate of Sammie Barman Delaune;

Joyce B. Metcalf, Transferee of the Estate of Sammie Barman Delaune;

Peggy Ann Geiler, Transferee of the Estate of Sammie Barman Delaune;

Samuel Buckmaster, Jr., Transferee of the Estate of Sammie Barman Delaune

United States of America - Respondent

The following is a list of all interested persons who were not named parties in the action below:

Solomon Acy, Transferee of the Estate of Sammie Barman Delaune

Estate of Hazel Hearin, Transferee of the Estate of Sammie Barman Delaune

William P. Delaune, Transferee of the Estate of Sammie Barman Delaune

Bessie D. Gautreau, Transferee of the Estate of Sammie Barman Delaune

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PREVIOUS OPINIONS

The citations of the official and unofficial reporters of the opinions and orders entered in this case, in reverse chronological order, are:

Fifth Circuit granted appellee's motions to recall mandate and to amend the court's opinion dated June 29, 1998: *Delaune v. United States*, No. 97-30385 (5th Cir. Oct. 12, 1998).

Fifth Circuit denied appellants' petition for panel rehearing: *Delaune v. United States*, No. 97-30385 (5th Cir. Aug. 26, 1998).

Fifth Circuit reversed decision of the District Court for the Middle District of Louisiana: *Delaune v. United States*, 143 F. 3d 995, 82 A.F.T.R. 2d (RIA) ¶ 98-5019 (5th Cir. 1998), *reh'g denied*, Aug. 26, 1998.

District Court of the Middle District of Louisiana held for the defendant and dismissed the plaintiffs' claim: *Estate of Delaune v. United States*, 79 A.F.T.R. 2d (RIA) ¶ 97-1509, 97-1 U.S.T.C. (CCH) ¶ 60,266 (M.D. La. 1997).

District Court for the Middle District of Louisiana denied parties' motions for summary judgment: *Estate of Delaune v. United States*, 1996 W.L. 527052, 77 A.F.T.R. 2d (RIA) ¶ 96-1118, 96-1 U.S.T.C. (CCH) ¶ 60,221 (M.D. La. 1996).

STATEMENT OF JURISDICTION

The Fifth Circuit reversed the decision of the District Court for the Middle District of Louisiana on June 29, 1998. *See* Appendix I. The petitioners filed a timely petition for panel rehearing, which was denied on August 26, 1998. *See* Appendix II. The respondents filed a motion to correct a computational error in the money judgment, which was granted on October 12, 1998. *See* Appendix III. The Estate of Sammie Barman Delaune, through its co-executors, now timely seeks a Writ of Certiorari. The other appellants in the proceeding in the Fifth Circuit have no interest in the outcome of and are not parties to this petition.

This Court has jurisdiction to review on a writ of certiorari the judgment in question pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The following statutes are relevant to the issues in this case and are set-out verbatim in Appendix IV:

26 U.S.C. § 2001(a)
26 U.S.C. § 2002
26 U.S.C. § 6324(a)
26 U.S.C. § 6402(a)
26 U.S.C. § 6511(a)
26 U.S.C. § 6901(a) & (b)
26 U.S.C. § 7422(a)
26 U.S.C. § 7701(a)(14)
28 U.S.C. § 1254
28 U.S.C. § 1340
28 U.S.C. § 1346(a)

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This is an appeal for the refund of the overpayment of federal estate taxes erroneously assessed against the petitioners.

Sammie Barman Delaune (Sammie) was married to Joseph N. Delaune, Jr. (Jack) and they had no children. They lived in Ascension Parish, Louisiana.

Jack died on May 31, 1986. His will left his entire estate, except $3,000 in special bequests, to Sammie. Sammie died on January 26, 1987. Sammie's will left her entire estate, except $3,000 in special bequests, to Jack. Because Jack predeceased Sammie, all but $6,000 of the their combined net estates would pass to Sammie's heirs under Louisiana's laws of intestacy.

Recognizing that Jack's heirs would receive nothing, which was contrary to the wishes of the decedents, Sammie's heirs disclaimed a portion of their inheritance from Sammie. This disclaimed portion flowed to Jack's heirs under state law and accomplished the stated wishes of the decedents.

Sammie's estate filed a United States Estate Tax Return on October 26, 1987, showing the disclaimer and filed an Amended United States Estate Tax Return on May 16, 1988, correcting an unrelated error and showing a refund was due. On audit, the Internal Revenue Service (Service) accepted the adjustments made on the amended return, but refused the disclaimer. The Service assessed the estate and its transferees $146,727.53 in additional estate taxes and interest. The transferees were assessed

because the property of the estate had been distributed to the heirs. Sammie's estate and most of its transferees paid the assessed deficiency on November 28, 1990.[1]

II. PROCEDURAL HISTORY

Pursuant to 26 U.S.C. §§ 7422(a) and 6511(a), Sammie's estate, through its co-executors, and some of the transferees filed a timely Claim for Refund and Request for Abatement with the Service. The Service denied their claim.

On April 26, 1994, Sammie's estate, through its co-executors, and some of the transferees filed a timely Complaint in the United States District Court for the Middle District of Louisiana pursuant to 28 U.S.C. §§ 1340 & 1346(a)(1) and 26 U.S.C. § 7422(a). After a bench trial, the district court dismissed the claims.

On April 9, 1997, Sammie's estate, through its co-executors, and some of the transferees filed a timely appeal to the United States Court of Appeals for the Fifth Circuit pursuant to Fed. R. App. P. Rule 4. In a Judgment dated June 28, 1998, the Fifth Circuit reversed the district court and awarded a money judgment in favor of the transferees. The Fifth Circuit held that the disclaimer was valid, but that only the transferees were entitled to a refund. The Fifth Circuit denied the estate's claim that it was the taxpayer with standing to seek a

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1. One of the transferees refused to pay, so the estate paid his share with funds that had not been distributed.

refund on behalf of all of the transferees.[2]

Sammie's estate, through its co-executors, and some of the transferees filed a timely Petition for Panel Rehearing asking the Fifth Circuit to include in the money judgment the refund of estate taxes previously approved by the Service. The Fifth Circuit denied the Petition for Panel Rehearing on August 26, 1998.

The United States filed a motion to recall the mandate and motion to amend the court's opinion to include in the money judgment the refund of estate taxes previously approved by the Service. The Fifth Circuit granted these motions on October 12, 1998.

The Estate of Sammie Barman Delaune, through its co-executors, now file this Petition for Writ of Certiorari with this Honorable Court. The other appellants in the proceeding in the Fifth Circuit have no interest in the outcome of and are not parties to this petition.

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2. Apparently, the Fifth Circuit misunderstood the estate's argument because it stated that the estate requests "that the entire amount of the deficiency be remitted to their custody." *Delaune v. United States*, 143 F. 3d 995, 1006, 82 A.F.T.R. 2d (RIA) ¶ 98-5019 (5th Cir. 1998), *reh'g denied* Aug. 26, 1998. The estate and the co-executors have never contended that they made the entire overpayment or should receive all of the refund checks. What the estate and its co-executors have always contended is that they are subject to and were assessed the tax, making them taxpayers with standing to bring the refund claim pursuant to the Federal Tort Claims Act. The petitioners have never claimed that any refund checks should be sent to anyone other than the persons who actually made the overpayment.

ARGUMENT

I. REASONS FOR ALLOWANCE OF THE WRIT

The Fifth Circuit held "that any party's standing to seek a refund [of an overpayment of taxes] in a given case is limited to the amount of his own overpayment." *Delaune*, 143 F. 3d at 1006. This decision limits the definition of "taxpayer" and standing to seek a refund of taxes erroneously and illegally assessed.

This decision involves an important question of federal law that should be resolved by this Court because it conflicts with the plain language of the Federal Tort Claims Act, 28 U.S.C. § 1346(a). This decision also conflicts with the reasoning of this Court in *United States v. Williams*.[3]

II. IMPOSITION AND LIABILITY FOR PAYMENT OF THE ESTATE TAX

"A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States." 26 U.S.C. § 2001(a). "[T]he tax imposed by this chapter shall be paid by the executor." 26 U.S.C. § 2002. Transferees of property of a decedent are also personally liable for unpaid estate taxes. *See* 26 U.S.C. §§ 6901(a) (transferee is secondarily liable) & (b); 26 U.S.C. § 6324(a) (estate tax lien). Essentially, the United States can pursue the estate, its executors and transferees for any uncollected estate tax. *See United States v. Russell*, 532 F. 2d 175, 177, 37

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3. 514 U.S. 527, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995).

A.F.T.R. 2d (RIA) ¶ 76-1578, 76-1 U.S.T.C. (CCH) ¶ 13,134 (10th Cir. 1976) (It is the liability of the taxpayer-transferor that is enforced under the transferee provision.).

The United States assessed additional estate taxes against the estate through its co-executors. When it discovered that the estate's assets had been distributed to the heirs, the United States also assessed the transferees with the additional estate tax.[4] Most of the transferees paid their share of the additional estate tax assessment, plus interest. After exhausting their administrative remedies, the estate, through its co-executors, and some of the transferees filed an action in district court pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346.

III. JURISDICTION AND STANDING

The United States contends that the doctrine of sovereign immunity[5] bars the petitioners from seeking a

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4. In the Fifth Circuit, the United States conceded that "[t]he amount of the estate tax deficiency was assessed by the IRS against the estate and also against the estate's transferees under the transferee liability provisions of the Code. See I.R.C. § 6901(a)(1)(A)(ii)." *See* Brief for Appellee at pp. 35-36, *Delaune v. United States*, 143 F. 3d 995 (5th Cir. 1998) (No. 97-30385).

5. The United States is immune from suit under the doctrine of sovereign immunity. The federal courts do not have jurisdiction over a claim against the United States unless there is an express congressional waiver of sovereign immunity. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95, 111 S. Ct. 453, 457, 112 L. Ed. 2d 435 (1990), *reh'g denied*, 498 U.S. 1075, 111 S. Ct. 805, 112 L. Ed. 2d 865 (1991). The courts may not enlarge the waiver beyond the express statutory language. *See Department of Energy v. Ohio*, 503

claim for refund of taxes erroneously and illegally assessed because only the transferees (who were assessed and actually paid the tax) have standing to bring a refund action under the Federal Tort Claims Act. The petitioners contend that their claim for refund of the erroneously and illegally assessed taxes falls squarely within the jurisdiction of this Court pursuant to the Federal Tort Claims Act because the estate, through its co-executors, was assessed the tax.[6]

In 28 U.S.C. § 1346(a)(1), the United States waives sovereign immunity for suits to recover taxes erroneously or illegally assessed or collected.[7] On its face, this statute

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U.S. 607, 615, 112 S. Ct. 1627, 1633, 118 L. Ed. 2d 255 (1992). Any waiver of sovereign immunity must be strictly construed in favor of the United States. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S. Ct. 1011, 1014-1015, 117 L. Ed. 2d 181 (1992).

See also Williams, 514 U.S. at 531, 115 S. Ct. at 1615-1616, 131 L. Ed. 2d at 608.

6. *See* Mertens Law of Fed. Income Tax. § 53.28 (1993) ("Transferee liability is based upon the existence of tax liability on the part of the transferor. No liability can be successfully asserted against the transferee of property if the transferor itself was not liable for the tax.").

7. The Federal Tort Claims Act also confers original jurisdiction of tax refund suits on the United States district courts. The pertinent part of 28 U.S.C. § 1346(a) states:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for

gives the person assessed the tax standing to sue for a refund. The estate was assessed the tax. *See supra* note 4 and Appendix V. Therefore, it has standing to seek a refund of taxes erroneously and illegally assessed.[8]

IV. "TAXPAYER" DEFINED

The United States contends that only a "taxpayer" has standing to bring a refund action under 28 U.S.C. § 1346(a)(1) and that the estate and its co-executors are not "taxpayers" because the transferees actually paid the tax.

Congress defined the term "taxpayer." The pertinent part of 26 U.S.C. § 7701(a) provides:

> When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof --

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> the recovery of any Internal Revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the Internal Revenue laws; . . .

8. The Federal Tort Claims Act must be interpreted in light of various procedural requirements of the Internal Revenue Code. *See United States v. Dalm*, 494 U.S. 596, 601, 110 S. Ct. 1361, 1364, 108 L. Ed. 2d 548, *reh'g denied*, 495 U.S. 941, 110 S. Ct. 2195, 109 L. Ed. 2d 523 (1990). Congress required that administrative remedies be exhausted before a party can bring an estate tax refund action in district court. *See* 26 U.S.C. § 7422(a). Congress also imposed a statute of limitations on the filing of claims for refund. *See* 26 U.S.C. § 6511(a). It is undisputed that the estate and its co-executors satisfied the procedural requirements of 26 U.S.C. §§ 7422(a) and 6511(a).

* * *

> (14) The term "taxpayer" means any person subject to any internal revenue tax.

* * *

Sammie's death triggered the estate tax. *See* 26 U.S.C. § 2001(a). Her estate was "subject to" the tax. 26 U.S.C. § 7701(a)(14). The United States assessed the tax against her estate. It was only when it discovered that the estate was insolvent that the United States assessed the transferees. *See Russell*, 532 F. 2d at 177; *supra* note 6.

The estate is included in the statutory definition of "taxpayer." *See* 26 U.S.C. § 7701(a)(14). The statutory definition of "taxpayer" is inclusive, not exclusive, as the United States contends. *See Williams*, 514 U.S. at 534, 115 S. Ct. at 1617, 131 L. Ed. 2d at 616; *Brodey v. United States*, 788 F. Supp. 44, 48, 70 A.F.T.R. 2d (RIA) ¶ 92-5273, 91-2 U.S.T.C. (CCH) ¶ 50,501 (D. Mass. 1991).

The only statutory authority that the United States presents to support its argument for an "exclusive" definition of "taxpayer" is 26 U.S.C. § 6402(a), which provides:

> In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c) and (d),

refund any balance to such person.[9]

The United States' reliance on § 6402(a) is misguided because, when taken in context, it simply authorizes the Service to offset any overpayment with any liability of the payor and refund the balance to the payor. The word "taxpayer" does not appear in the text of this section and it is silent on the issue of standing. Section 6402(a) does not determine the jurisdiction of the court.[10] The court has jurisdiction over the estate's claim pursuant to the Federal Tort Claims Act.

V. THE "ASSESSED" VS. "PAID THE TAX" DICHOTOMY

According to the United States, to be a "taxpayer" with standing to claim a refund under the Federal Tort Claims Act, the estate must have been both assessed the tax *and* have paid the tax. The petitioners contend that a person has standing to claim a refund if it was either assessed the tax *or* paid the tax.

Recently, this Court addressed a similar argument in *United States v. Williams*, 514 U.S. 527, 115 S. Ct. 1611,

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9. *See Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860, 106 S. Ct. 1600, 1607, 89 L. Ed. 2d 855, 57 A.F.T.R. 2d (RIA) ¶ 86-1189, 86-1 U.S.T.C. (CCH) ¶ 9340 (1986) ("The phrase ['person who made the overpayment'] merely identifies the *person* entitled to the refund; it does not restrict the nature of the refund itself." (emphasis supplied)).

10. Rejecting a similar argument in *Williams*, 514 U.S. at 534, 115 S. Ct. at 1617, 131 L. Ed. 2d at 616, this Court distinguished 26 U.S.C. § 6402(a), which describes "recipients" of overpayment refunds, from 26 U.S.C. §§ 6511(a) and 7701(a)(14), which grant "taxpayers" relief from overpayments.

131 L. Ed. 2d 608 (1995). In *Williams*, the United States denied the claim for refund by a person who paid the tax, contending that only persons "assessed" the tax are taxpayers with standing to file a refund suit. Ironically, the United States is now taking the position that the person assessed the tax is *not* a taxpayer and lacks standing to file a refund suit.

This Court rejected the argument limiting the definition of "taxpayer," stating that "[t]he general phrase 'subject to' is broader than the specific phrase 'assessed' . . . ." *Williams*, 514 U.S. at 535, 115 S. Ct. at 1617, 131 L. Ed. 2d at 617. This Court reasoned:

> To read the term "taxpayer" as implicitly limiting administrative relief to the party assessed is inconsistent with other provisions of the refund scheme, which expressly contemplate refunds to parties other than the one assessed. Thus, in authorizing the Secretary to award a credit or refund "[i]n the case of an overpayment," 26 U.S.C. § 6402(a) describes the recipient not as the "taxpayer," but as the "person who made the overpayment." Similarly, in providing for credits or refunds for sales taxes and taxes on tobacco and alcohol, 26 U.S.C. § 6416(a) and 26 U.S.C. 6419(a) describe the recipient as "the person who paid the tax."

Williams, 514 U.S. at 534, 115 S. Ct. at 1617, 131 L. Ed. 2d at 616. Although it directly addressed the "paid the tax" prong of the dichotomy, *Williams* taught us that either the

person assessed *or* the person who paid the tax has standing to claim a refund.

The United States' definition of "taxpayer" has been inconsistent.[11] Despite *Williams*, using an exclusive definition of "taxpayer", the United States continues to argue that only the party assessed with the deficiency has standing to bring a refund suit. *See Williams*, 514 U.S. at 535, 115 S. Ct. at 1617, 131 L. Ed. 2d at 617; *Beauchamp*

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11. In *Boryan v. U.S.*, 690 F. Supp. 459, 62 A.F.T.R. 2d (RIA) ¶ 88-5965, 88-2 U.S.T.C. (CCH) ¶ 13,775 (E.D. Va. 1988), *aff'd*, 884 F. 2d 767, 64 A.F.T.R. 2d (RIA) ¶ 89-5916, 89-2 U.S.T.C. (CCH) ¶ 13,814, 14 Fed. R. Serv. 3d 998 (4th Cir. 1989), the decedent's estate and an *inter vivos* trust created by the decedent paid the estate taxes. The estate and trust terminated and the trust beneficiaries filed a claim for refund of estate taxes. The United States asserted that the estate, not the trust beneficiaries that actually paid the tax, was the only party with standing to seek the refund. Ironically, in the instant case the United States is asserting that the estate beneficiaries that actually paid the tax, not the estate, is the only party with standing to seek the refund.

In *Thompson v. United States*, 332 F. 2d 657, 660-662, 13 A.F.T.R. 2d (RIA) ¶ 1558, 64-2 U.S.T.C. (CCH) ¶ 9522 (5th Cir. 1964), the settlors of a trust disputed their individual income tax liability. The United States issued a Notice of Levy naming the trust as the taxpayer and seized the trust's bank account. The settlors, as individuals, filed a claim for refund which the United States disputed claiming the "taxpayer" was the trust. The court rejected the United States' argument because the real dispute was with the settlors individually, reasoning:

> Status as one subject to a tax need not necessarily require unquestioned liability for it. That might turn on intricate factual-legal questions . . . .

Thompson, 332 F. 2d at 662, fn. 12.

v. United States, 4 F. Supp. 2d 213, 217, 82 A.F.T.R. 2d (RIA) ¶ 98-6181, 98-1 U.S.T.C. (CCH) ¶ 50,480 (W.D. N.Y. 1998) ("The essence of defendant's argument [in *Williams*] is that § 1346 is available only to challenge a wrongfully assessed tax, not to challenge the wrongful collection of a tax."); *Krause v. United States*, 1996 W.L. 882652, 97-1 U.S.T.C. (CCH) ¶ 50,307 (W.D. Mich. 1996). *See also*, *Dahn v. United States*, 127 F. 3d 1249, 80 A.F.T.R. 2d (RIA) ¶ 97-7631, 97-2 U.S.T.C. (CCH) ¶ 50,847 (10th Cir. 1997); *Fidelity & Deposit Co. of Maryland v. City of Adelanto*, 87 F. 3d 334, 78 A.F.T.R. 2d (RIA) ¶ 96-5069, 96-2 U.S.T.C. (CCH) ¶ 50,332 (9th Cir. 1996); *WWSM Investors v. United States*, 64 F. 3d 456, 76 A.F.T.R. 2d (RIA) ¶ 95-6498, 95-2 U.S.T.C. (CCH) ¶ 50,454 (9th Cir. 1995).

Now, the United States argues that only the party that paid the deficiency has standing to bring a refund suit.

> The Government may not look to the substance of the transaction for purposes beneficial to its interests and disregard the substance for other purposes beneficial to plaintiff's interests.

Bailey v. United States, 122 Ct. Cl. 552, 104 F. Supp. 997, 1001, 52-1 U.S.T.C. (CCH) ¶ 9347, 42 A.F.T.R. (RIA) ¶ 78 (1952). The statutory definition of "taxpayer" does not change to accommodate the set of facts that generates more revenue for the public fisc.

The estate is the taxpayer because it is "subject to" the estate tax. *See* 26 U.S.C. § 2001(a). It created the tax

liability and the estate and its co-executors were assessed the deficiency. *See* 26 U.S.C. § 2002. The estate, through its co-executors, disputed the assessment, filed a timely administrative claim for refund and lost, filed a timely suit for refund and lost, and timely appealed the decision of the district court to the Fifth Circuit and won.

The fact that the transferees were secondarily liable, assessed and paid the tax does not change the fact that the estate is the taxpayer.[12] The estate and its co-executors were primarily liable for the tax. *See* 26 U.S.C. §§ 2001(a) and 2002. The Fifth Circuit ruled that the tax was erroneously and illegally assessed and collected. *See Delaune*, 143 F. 3d at 995. Since transferee liability is based on the existence of tax liability on the part of the transferor, a transferee cannot be liable if the transferor itself was not liable for the tax. *See* sources cited *supra* note 6. The United States erred when it assessed the estate and its transferees with the tax.[13] The Federal Tort Claims Act specifically gives standing to bring refund actions to persons erroneously or illegally assessed a tax. *See* 28 U.S.C. § 1346(a)(1). It is undisputed that the estate was assessed the tax. *See supra* note 4 and Appendix V.

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12. In fact, Government Trial Exhibit 22, an internal I.R.S. document, lists the Estate of Sammie Barman Delaune as the "taxpayer." *See* Appendix V.

13. *Beauchamp*, 4 F. Supp. 2d at 217 ("Accepting the Government's argument that [the taxpayer] cannot now seek a refund for taxes that she does not owe (but which were illegally collected from her by the IRS) would subject her to a manifest injustice.").

The estate and its co-executors are the proper parties to exert a claim for the full refund of the taxes erroneously and illegally assessed to them. The great weight placed by the United States on 26 U.S.C. § 6402(a) is misplaced. That section does not limit 28 U.S.C. § 1346(a)(1), but simply determines who is sent the refund check.

CONCLUSION

The Fifth Circuit held that the United States erroneously and illegally assessed the estate tax. When the United States erroneously and illegally assessed the tax, it wrongfully assessed the entire tax and the entire amount should be refunded.

The United States erroneously and illegally assessed the tax to the estate and its co-executors. The estate and its co-executors are "taxpayers" as defined in 26 U.S.C. § 7701(a)(14) because they are "subject to" the tax. They timely exhausted their administrative remedies as required by 26 U.S.C. §§ 7422(a) and 6511(a) and timely filed a "civil action against the United States" to recover an "Internal Revenue tax alleged to have been erroneously or illegally assessed" against them as required by 28 U.S.C. § 1346(a)(1).

The estate and its co-executors have standing to bring this action because the Federal Tort Claims Act waives sovereign immunity for suits to recover taxes "erroneously or illegally assessed." 28 U.S.C. § 1346(a)(1). The United States' claim that the estate and its co-executors lack standing because of sovereign immunity has no substantial basis in fact or in law and is without merit.

For the foregoing reasons, the petitioners respectfully ask that this Court grant their Petition for Writ of Certiorari and, after due proceedings, reverse the decision of the Fifth Circuit limiting the estate tax refund to some of the transferees of the estate.

Respectfully submitted,

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Dated: November 23, 1998

APPENDIX

I. FIFTH CIRCUIT OPINION

[143 F. 3d 995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30385

SAMMIE BARMAN DELAUNE, Estate; DENISE LOVELESS, Co-Executors and Transferees of the Estate of Sammie Barman Delaune; MAE ACY AMEDEE, Co-Executors and Transferees of Estate of Sammie Barman Delaune; WILLIAM R. SMITH, JR., Transferees of the Estate of Sammie Barman Delaune; PHYLLIS ROBIRA ZAPP, Transferees of the Estate of Sammie Barman Delaune; BERTHA THOMAS, Transferees of the Estate of Sammie Barman Delaune; JANE LEE VAN REENEN, Transferees of the Estate of Sammie Barman Delaune; JOYCE B. METCALF, Transferees of the Estate of Sammie Barman Delaune; PEGGY ANN GEILER, Transferees of the Estate of Sammie Barman Delaune; SAMUEL BUCKMASTER, JR., Transferees of the Estate of Sammie Barman Delaune,

Plaintiffs-Appellants,

versus

UNITED STATES of America,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana

Before WISDOM, JOLLY and HIGGINBOTHAM, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case will demonstrate how, under the Louisiana Law Civil, the past is not dead; how the past will not die; and how, indeed, the past is not even past. But first, let us say that this appeal arises from the district court's denial of an estate tax refund to the appellants, the estate and certain heirs of Sammie Barman Delaune. The dispute primarily involves the purported renunciation of a Louisiana succession, which both the Commissioner of Internal Revenue and the district court found to be inadequate as a matter of federal and Louisiana law. In particular, the district court held the renunciation to be invalid under Louisiana law because the Louisiana Civil Code plainly does not provide for the renunciation of a succession by the heirs of a dead heir on her behalf. In this case, however, the Law Civil will not let us stop with a plain reading of the current Code. Because, under the Law Civil, the Code Napoleon of 1804 adds clarity to the work of Louisiana's subsequent Digesters and Redactors, and hence to the Code we read today, we hold that Louisiana law does in fact provide for the renunciation of a succession by the heirs of an heir, and therefore find no state law defect in the renunciation at issue. Because we further hold that the renunciation was not otherwise

defective as a matter of federal law, we reverse the judgment of the district court.

I

The relevant facts are undisputed. Joseph "Jack" Delaune died on May 31, 1986. Under his will, his entire estate, with the exception of $3,000 in special bequests, was devised to his wife, Sammie.

For some time prior to Jack's death, Jack and Sammie had been living in a nursing home. Jack's brother, William Delaune, had been handling Jack's affairs under a power of attorney, and he paid for Jack and Sammie's expenses by writing checks out of an account that belonged to the couple as undivided community property. After Jack died, William Delaune continued to pay Sammie's expenses out of this account, and replenished it on one occasion with $100,000 drawn from another community property account. During this time, the income from Jack's estate continued to accumulate as it had done before, which is to say that it went into the community property accounts. It is undisputed that the expenses incurred by Sammie after Jack's death were less than the income from her portion of the community property.

Sammie's will was a mirror image of Jack's, and devised her entire estate to him, with the exception of $3,000 in special bequests. Because Jack had predeceased Sammie, this devise to him had lapsed, and, unless something were done, their combined estates, with the exception of $6,000, would pass to Sammie's heirs by intestacy when she died. As Jack had a separate line of

heirs from Sammie, this was not a good outcome, both as a matter of Jack and Sammie's expressed desires for their heirs, and from the perspective of a long and contentious probate fight.

On January 14, 1987, Sammie met with attorneys to discuss her estate planning options. Among other things, Sammie's attorneys proposed redrafting her will to provide a bequest to Jack's heirs or executing a renunciation of some portion of the bequest she had received from Jack, so that it would pass immediately to Jack's heirs by intestacy. Sammie's attorneys pointed out that the latter option would be much better from a tax perspective, as it would allow the property to go to Jack's heirs with only one level of estate tax (Jack - Tax -> Jack's heirs) as opposed to two (Jack - Tax -> Sammie - Tax -> Jack's heirs).

Based on the tax advantages, Sammie decided to go with the renunciation plan, and directed her attorneys to return when they had drawn up the appropriate papers. The *999 Fell Sergeant[1] who commands our last days waits not for the orderlies, however, and before the renunciation could be completed and executed, Sammie lapsed into a coma. She died on January 26.

Despite the medical evidence to the contrary, William Delaune remained convinced that Sammie could be reanimated for a limited amount of post-hoc estate planning. On February 6, acting in his capacity as an heir of Jack, he filed a petition in Louisiana state court for a

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1. William Shakespeare, Hamlet, act 5 sc. 2.

Rule to Show Cause why the aborted renunciation should not be given effect. He contended, essentially, that Sammie's decision to make a renunciation before she died created a legally enforceable "natural" obligation in favor of Jack's heirs that the court was bound to recognize.

On February 23, a meeting was held with a number of the attorneys representing various of the interested parties and heirs. They discussed, among other things, the legality of a renunciation made on Sammie's behalf, and agreed on a plan for achieving a more "equitable" distribution of the combined successions to the two lines of heirs.

On February 27, a hearing was held on the Rule to Show Cause. At that hearing, an agreed judgment was signed by all interested parties (other than Sammie's estate) and approved by the probate judge. Under the judgment, Sammie's heirs purported to renounce, in her name and on her behalf, a portion of Jack's succession equal to two-sevenths of the combined estates.

Sammie's estate filed an estate tax return in which the "renounced" portion of Jack's succession was excluded from her gross estate, on the basis that there had been a qualified disclaimer pursuant to I.R.C. § 2518. After an audit, the Commissioner took issue with this exclusion, and declared a deficiency of $146,728 to cover the estate tax that he felt should have been paid on the purportedly renounced portion of Jack's succession. As the assets in Sammie's estate had been already largely distributed, the Commissioner sent notices of transferee liability to Sammie's heirs, and, on November 28, 1990, the estate

and heirs paid the deficiency in full.

II

After exhausting their administrative remedies, on April 26, 1994, Sammie's estate and nine of her fourteen heirs (the "Delaunes") filed suit in the Federal District Court for the Middle District of Louisiana seeking a refund of the entire deficiency. Eventually, this claim went to trial before District Judge Parker. At trial, the Delaunes argued that the renunciation had been a qualified disclaimer under I.R.C. § 2518, such that the renounced portion of Jack's succession was properly excluded from Sammie's gross estate. In the alternative, they asserted that the natural obligation to renounce arising from Sammie's pre-death decision constituted a claim against her estate for the amount of the renunciation, and that this amount was therefore also excludable pursuant to I.R.C. § 2053(a)(3).

The Commissioner argued that the renunciation was not a qualified disclaimer under § 2518 because Louisiana law does not allow for renunciation by the heirs of an heir, and because Sammie had accepted the benefits of Jack's succession for purposes of § 2518(b)(3) before the renunciation was made. The Commissioner also contended that the natural obligation was not a claim against the estate under § 2053 because it was not enforceable as a matter of Louisiana law and because it was not contracted for in exchange for an adequate consideration in money or money's worth, as required by § 2053(c)(1). Finally, the Commissioner also argued that, even if a refund were due, the nine heirs and estate could

only claim the amounts that they had actually paid, not the entire deficiency.

On March 7, 1997, Judge Parker issued his findings of fact and conclusions of law. He ruled that § 2518(b)(4) implicitly requires that a disclaimer be valid under state law before it can be a qualified disclaimer for federal estate tax purposes, as that section provides that the interest at issue must pass without any direction from the disclaimant. *1000 Further, Judge Parker held that the renunciation at issue was not valid under Louisiana law. He based this conclusion principally on La. Civ. Code art. 1007, which expressly allows the heirs of an heir to accept a succession on behalf of the dead heir. Because this provision contains no mention of renunciation, Judge Parker reasoned that renunciation by the heirs of an heir was prohibited by implication. He therefore concluded that the attempted renunciation in this case was not a qualified disclaimer for federal estate tax purposes. In the alternative, Judge Parker ruled that the attempted renunciation was also not a qualified disclaimer because Sammie had previously accepted the benefits of Jack's succession in the form of the nursing home expense payments and interest accrual. Finally, Judge Parker also held that Sammie's alleged decision to renounce did not create an enforceable natural obligation as a matter of Louisiana law, and was therefore not an excludable claim against her estate for purposes of § 2053. On the basis of these holdings, Judge Parker sustained the Commissioner's declaration of deficiencies and denied the Delaunes' request for a refund. From this final judgment the

Delaunes timely appeal.

III

We review the decision of a district court in a tax matter applying the same standards used in reviewing a decision of the Tax Court. Estate of McLendon v. Commissioner of Internal Revenue, 135 F. 3d 1017, 1021 (5th Cir. 1998). Findings of fact are accepted unless clearly erroneous; legal conclusions are reconsidered de novo. Ballard v. United States, 17 F. 3d 116, 118 (5th Cir. 1994).

IV

As in the district court, on appeal the Delaunes urge two alternative theories to justify the exclusion of the "renounced" portion of Jack's succession from Sammie's estate. First, they argue that the renunciation was a qualified disclaimer excludable under § 2518. Second, they assert that Sammie's decision to make the renunciation gave rise to a natural obligation under Louisiana law that is excludable under § 2053. Based on the clear terms of the federal statute and regulations, and the history of the relevant Louisiana code provision, we hold that the renunciation in question was a qualified disclaimer for purposes of § 2518. Because this is sufficient to justify the Delaunes' exclusion, we need not reach the merits of their alternative argument.

A

In general, § 2518 allows an heir to exclude from her own gross estate any interest in an inheritance that she disclaims with a "qualified" disclaimer. There are various requirements for a disclaimer to be qualified.

Among other things, the disclaimer must be made before the heir has "accepted the interest or any of its benefits." § 2518(b)(3). In addition, it must also be the case that "as a result of the refusal, the interest passes without any direction on the part of the person making the disclaimer." § 2518(b)(4). See also Estate of Monroe v. Commissioner of Internal Revenue, 124 F. 3d 699, 703 & n. 1 (5th Cir. 1997).

The Commissioner argues that the renunciation in this case was not a qualified disclaimer because it was not valid to pass an interest under Louisiana law, as implicitly required by § 2518(b)(4), and because it was not made before Sammie had accepted the benefits of the succession, as explicitly required by § 2518(b)(3). There is no merit to either argument.

B

The Commissioner first contends that the February 27 renunciation was not qualified for purposes of § 2518 because it was not valid to pass an interest under Louisiana law. As we understand his argument,[2] the

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2. The Commissioner has not urged that the February 27 renunciation was defective as a matter of Louisiana law on any other basis--as, for example, a form fault--and we generally do not consider arguments that have not been raised by the parties on appeal. United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F. 3d 899, 903 n. 3 (5th Cir. 1998). That said, although the form of the February 27 transaction was admittedly not in strict compliance with the procedural requirements of the Louisiana Civil Code, see La. Civ. Code art. 1017 (requiring that renunciation be made by public act

*1001 Commissioner reaches this conclusion based solely on his perception that Louisiana law does not allow the heirs of a dead heir to renounce on her behalf, as was attempted in this case. We disagree with this construction of the relevant Louisiana code provision, and therefore hold that the renunciation in question was a valid one.

(1)

As an initial matter, we do agree with the Commissioner that state law validity is a necessary prerequisite for a disclaimer to be qualified under § 2518 in the circumstances of this case. As the district court also concluded, the clear terms of § 2518(b)(4) necessarily require that the disclaimer itself be valid to pass an interest under state law, because only in such a situation can it be said that the interest passes "as a result of the refusal" and "without any direction on the part of the person making the disclaimer." Thus, for example, a naked invalid disclaimer would be insufficient, as it would not pass an interest. Similarly, an invalid disclaimer coupled with a valid donative transfer would also be insufficient, as the interest would not pass "without any

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before a notary, in presence of two witnesses), it nonetheless appears to fall within the doctrine of judicial renunciation that has long been recognized by the Louisiana Supreme Court. See Succession of Tertrou, 217 La. 901, 47 So. 2d 681, 685 (1950) (succession may be renounced by judicial declaration in addition to the procedures listed in article 1017) (citing Union National Bank v. Choppin, 15 So. 304, 46 La. Ann. 629 (1894), and Carter v. Fowler, 33 La. Ann. 100 (1881)).

direction on the part of the person making the disclaimer."[3] We note in passing that this construction of § 2518(b)(4) accords with that reached by all of the other

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3. Of course, the latter case would nonetheless constitute a qualified disclaimer under § 2518(c)(3), as that section exempts the disclaimer itself from the rigors of § 2518(b)(1) & (4) where it is accompanied or replaced by an effective written transfer of the interest to the party or parties who would have received it had a qualified disclaimer been made. The clear language and legislative history of § 2518(c)(3) strongly suggest that it was enacted specifically to address the issue in this case, i.e., the fate of an otherwise unobjectionable disclaimer that is potentially invalid under state law. See, e.g., S. Rep. No. 97-144, at 142 (1981), reprinted in 1981 U.S.C.C.A.N. 241-42 (provision designed to overcome § 2518(b)(4)'s implicit requirement that disclaimer be valid to pass interest under state law). Read this way, § 2518(c)(3) is also well in keeping with the overall point of § 2518, which was, as both parties to this case agree, to bring a certain degree of federal uniformity to an area of taxation that had previously been entirely subject to the whims of state law. See H.R. Rep. No. 94-1380, at 65-68 (1976), reprinted in 1976 U.S.C.C.A.N. 3419-22.

Despite its obvious potential relevance, § 2518(c)(3) is not implicated in this case because the Delaunes' attorneys failed to attempt any transfer of the interest in question apart from the disclaimer itself. Had they bothered to argue the issue on appeal (which, perhaps unsurprisingly, they also did not, see note 2, supra), we would have been forced to agree with the only other federal court to consider the issue that § 2518(c)(3) requires, at a minimum, some attempt at a valid written transfer to named individuals. See Estate of Dancy v. Commissioner of Internal Revenue, 89 T.C. 550, 562, 1987 WL 45158 (1987), rev'd on other grounds, 872 F. 2d 84 (4th Cir.1989).

federal courts to have considered the issue.[4]

As a further predicate, we also agree with the Commissioner that we are not bound on the state law validity question in this case by the mere judgment entered by the Louisiana probate court. In Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 462-65, 87 S. Ct. 1776, 1781- 83, 18 L. Ed. 2d 886 (1967), the Supreme Court laid down an essentially Erie-based approach to the analysis of state court adjudications of state law questions that have occurred in prior aspects of a federal tax case. Brown v. United States, 890 F. 2d 1329, 1341-42 (5th Cir. 1989); cf. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Under this circuit's longstanding interpretation of the rather ambivalent majority opinion in Bosch, "unless the *1002 highest court in the state has spoken to the issue, a federal court is to make its own inquiry into state law." Brown, 890 F. 2d at 1342. In conducting this inquiry, of course, the lower state court's ruling will have some relevance. Id. That relevance will be limited, however, and "'will vary, depending on the particular tax statute involved as well as the nature of the state

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4. See DePaoli v. Commissioner of Internal Revenue, 62 F. 3d 1259, 1261-62 (10th Cir. 1995); Estate of Goree v. Commissioner of Internal Revenue, 1994 WL 379246 (T.C.); Estate of Bennett v. Commissioner of Internal Revenue, 100 T.C. 42, 66, 1993 WL 19583 (1993); Dancy, 89 T.C. at 554. The only arguably contrary decision reached by any court would appear to be In re Wiltz, 95 Misc. 2d 36, 406 N.Y.S.2d 671, 673 (N.Y. Sup. Ct. 1978).

proceeding that produced the judgment.'" Estate of Warren v. Commissioner of Internal Revenue, 981 F. 2d 776, 781 (5th Cir. 1993) (Garwood, J.) (quoting Brown, 890 F. 2d at 1342). Where, as here, the state court adjudication arises out of a manifestly non-adversarial proceeding and the relevant federal tax statute indicates no preference for the sanctity of the state court's ruling, we need accord no particular deference, and must conduct our own investigation of the relevant state law as declared by the state's highest court. See Brown, 890 F. 2d at 1342.

(2)

Turning to that question, we begin our inquiry with La. Civ. Code art. 1007. Under that article, it is clear that "[n]ot only the person who is entitled to an inheritance may accept it, but if he dies before having expressly or tacitly accepted or rejected it, his heir shall have a right to accept it under him." As the district court correctly surmised, the core question posed by this case is whether article 1007 also allows the heirs of a dead[5] heir to renounce on her behalf, as was attempted here. Based on the history and logic of the statute, we conclude that it does.

At the outset, we note that this question has not been squarely addressed by the Louisiana Supreme Court. As such, we must rely primarily on the history and lineage

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5. *Nemo est hæres viventis*; no one is heir to the living. Co. Litt. 8 (that is, Sir Edward Coke, Commentary upon Littleton 8 (Charles Butler ed., Legal Classics Library 18th ed. 1985) (1628)).

of article 1007, its construction by commentators, and its place in the statutory framework. See Shelp v. National Sur. Corp., 333 F. 2d 431, 435 n. 13 (5th Cir. 1964) (Wisdom, J.).[6]

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6. As Judge Wisdom noted, the civil law interpretive process is in some respects fundamentally different from the common law process with which we are generally familiar. This is particularly so where the interpretation is of a civil code:

> "The problem may be controlled by a code article. Controversy then will center about the interpretation of this article. For this there is an elaborate apparatus, the classic account of which is given by Geny, and by Savigny in the entire first volume of his System. The logical interdependence of the various texts, ethical notions, systematic considerations, contextual influences, historical factors, consequential effects, and the like, receive consideration. The important thing is the elaborate effort to ascertain the genuine significance of the text. In this there is no mere reliance upon the holdings of prior decisions. Indeed, the code civil expressly forbids decisions to be made so as to form a general rule of law, and anyone who examines Dalloz and Sirey will not find reference to authoritative materials other than the code texts. There is no stare decisis of interpretation. Furthermore, the interpretative process is not confined to the judges alone. The chief reliance is rather upon the theoretician as he has indicated his opinions in doctrinal writing. Interpretation of statutory texts is not the esoteric job of judges. It is an intellectual process in which law teachers have played a

Beginning with its history, we can readily see that article 1007 of the current Louisiana Civil Code (of 1870) is an exact copy of the English text of article 1001 of the Code of 1825.[7] The French text of article 1001,[8] in turn, is an almost exact copy of article 84[9] of the first title of the third book of the Digest of 1808.[10] Like much of the Digest of 1808, *1003 article 84 was taken directly from the French Code Napoleon of 1804. Under article 781 of the Code Napoleon, "[w]hen he to whom a succession has fallen has died without having repudiated it or without

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greater part than judges."

Shelp, 333 F. 2d at 435 n. 13 (quoting Franklin, The Historic Function of the American Law Institute: Restatement as Transitional to Codification, 47 Harv. L. Rev. 1367, 1377 (1934)).

7. The Code of 1825 was published in both a French and an English version, but it was originally drafted in French alone. See Shelp, 333 F. 2d at 436-37.

8. "*Non seulement celui qui est appelé à une succession, peut l'accepter, mais s'il est mort, avant que de l'avoir acceptée expressément ou tacitement, ou l'avoir répudiée, ses héritiers peuvent l'accepter de son chef.*"

9. "*Non-seulement celui qui est appelé à une succession, peut l'accepter, mais s'il est mort avant que de s'être décidé sur le parti de l'acceptation ou de la répudiation, les héritiers de cet héritier peuvent, de leur chef, l'accepter.*"

10. Which was originally drafted in French as well. See Shelp, 333 F. 2d at 436-37.

having accepted it expressly or tacitly, his heirs may accept it *or repudiate it* under his authority"[11] (emphasis added). Obviously, article 781 of the Code Napoleon, unlike article 84 of the Digest of 1808 or its successors, expressly allows the heirs of an heir to either accept or renounce a succession on behalf of the dead heir, and thus would allow the transaction attempted in this case. The question remains what significance we should attach to this fact.

Under Louisiana law, it is well established that the French version of the Code of 1825 is controlling as to articles with a civilian heritage that have not been changed since that time. Pickett v. RTS Helicopter, 128 F. 3d 925, 931 (5th Cir. 1997) (citing Shelp, 333 F. 2d at 438-39). As we have seen, article 1007 of the current Louisiana Civil Code is an exact copy of the English text of the civilian article 1001 of the Code of 1825, so the Shelp rule applies in the resolution of this case.

As Judge Wisdom's excellent discussion of Louisiana civil code interpretation in Shelp teaches, however, the relevance of old and somewhat hoary French law must go even farther in some instances. "'The very nature of a code requires that . . . when an article abstracts the preexisting law the earlier jurisprudence be considered in cases not covered by the abstract.'" Shelp, 333 F. 2d at 435 (quoting Dreyfous, Partial Defacement of

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11. "*Lorsque celui à qui une succession est échue, est décédé sans l'avoir répudiée ou sans l'avoir acceptée expressément ou tacitement, ses héritiers peuvent l'accepter ou la répudier de son chef.*"

Olographic Wills, 15 Tul. L. Rev. 272, 273-74 (1941)). As the Louisiana Supreme Court stated in deciding how to construe another article from the Code of 1825 that had been taken, like article 1007, directly from the Digest of 1808:

> The re-printing of [the Digest of 1808], together with the [1824] amendments, [in 1825] has induced some persons to believe that the whole code is to be taken as a new enactment, but this is not correct. . . . The article, therefore, now under consideration, must be governed by the rules which we have frequently applied to laws passed antecedent to the constitution [of 1812].

Durnford v. Clark's Estate, 3 La. 199, 202 (1931); see also Flower v. Griffith, 6 Mart. (n.s.) 89 (La. 1827) (holding that the omission in the Code of 1825 of certain articles from the Digest of 1808 did not constitute a repeal of those earlier articles).[12]

In this case, our investigation of article 1007's

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12. As is evident from Durnford, this relevance of pre-1825 law remains despite the fact that the Louisiana legislature attempted to repeal the earlier law on multiple occasions in 1825 and 1828. See Shelp, 333 F. 2d at 435-36, 437; see also Moulin v. Monteleone, 165 La. 169, 178-84, 115 So. 447 (1927) (holding that provisions of the Code of 1825 are still properly interpreted according to the legal principles that prevailed in Louisiana preceding the Code's adoption), overruled as to result by 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 234 (La. 1989) (Dennis, J.).

statutory predecessors leads us to the conclusion that when article 781 of the Code Napoleon was taken into the Digest of 1808 and thence into the Code of 1825, it was simply rephrased and abstracted, resulting in the current wording. This reworking resulted in a considerably more streamlined sentence, but, out of inadvertence or a misguided desire to avoid unnecessary verbiage at all costs, omitted the final instance of "repudiate." This is the only explanation that makes any sense in the light of the fact that we can ascertain no indication that the change in wording was intended, desired, or even authorized to materially alter the effect of article 781 of the Code Napoleon. See Shelp, 333 F. 2d at 433 n. 4 (noting that the Digest of 1808 was entitled "A Digest of the Civil Laws *Now in Force* in the Territory of Orleans with Additions and Amendments Adapted to its Present System of Government" (emphasis added)).[13] For this reason,[14]

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13. Although the laws "in force" at the time were technically those of Spain, not France, because France and Spain are both civil law countries, and because the chief source of the Code of 1825 was the Code Napoleon, "[t]he codes of Louisiana can be [best] explained by assuming that the redactors concluded that in most respects the law of Louisiana was the same as the law of France." Dreyfous, 15 Tul. L. Rev. at 274.

14. Our result is also bolstered by the fact that the one minor difference in wording between the French text of article 1001 of the Code of 1825 and that of article 84 of the Digest of 1808 suggests an express allowance for partial acceptances in the Digest version. See note 9, supra (*"le parti de l'acceptation ou de la répudiation"*).

*1004 we conclude that the entire substance of article 781 of the Code Napoleon was transmitted into the Code of 1825, including the final instance of "repudiate." The gist of this conclusion is that the current article 1007 must be read to allow the heirs of an heir to either accept *or renounce* a succession on behalf of the dead heir so long as the other requirements are met.

This historical reading of article 1007 accords with the understanding of the principal commentators to have considered the question. In 1997, Louisiana completed a comprehensive revision of the law of successions and donations[15] that found its inspiration in a proposal from the Louisiana Law Institute. Article 955 of the proposal, which was destined to replace article 1007,[16] provided: "If a successor dies without having accepted or renounced succession rights, his right to accept *or renounce* is transmitted to his successors." Kerry J. Miller, Comment, The New Forced Heirship Law, its Implementing Legislation, and Major Substantive Policy Changes of the Louisiana State Law Institute's Proposed Comprehensive Revision of the Successions and Donations Laws, 71 Tul.

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15. This case, obviously, is governed by the prior law.

16. Article 955 did not make it into the final revision. Beginning in 1999, the Louisiana Civil Code will apparently no longer have any express provision concerning the renunciation or acceptance of succession rights by the heirs of an heir. One might say that this development adds finality to a creeping 200 year process of eroding the clarity from article 781 of the Code Napoleon.

L. Rev. 223, 285 (1996) (emphasis added). Under Miller's interpretation, "[p]roposed Article 955 reproduce[d] the substance of current Civil Code Article 1007 which allows the transmission of a successor's rights to his successors if he dies before accepting or renouncing." Id. at 254. Miller's conclusion is identical to that reached by two treatise writers in reviewing an earlier version of the same proposal. See 10 Frederick William Swaim, Jr. and Kathryn Venturatos Lorio, Louisiana Civil Law Treatise § 7.12 at 161 & n. 20 (West 1995).

Finally, the historical reading also accords with common sense. Succession rights are inherently a binary phenomenon in the Louisiana statutory scheme; they must either be accepted (expressly, tacitly, or by presumption) or rejected (expressly only). See La. Civ. Code art. 977. Just as the repudiation of a succession will not be presumed, see La. Civ. Code art. 1017, so too can no one be compelled to accept, see La. Civ. Code art. 977. In this context, it would be well-nigh meaningless to give an heir a right to accept without an accompanying right to reject.

The only response that the Commissioner has offered to this analysis has been to suggest that, even if article 1007 is read to contain an implicit right to renounce, that right should be construed as a right to renounce the derivative succession coming from the dead heir, not a right to renounce the succession going to that heir on her behalf. The Commissioner bases this argument on the current text of article 1007, which contains the fairly ambiguous language that "[the heir of

an heir] shall have a right to accept [the succession] *under him*" (emphasis added).

Unfortunately for the Commissioner, his argument flies in the face of the clear French text of article 1001 of the Code of 1825, and is thus invalid under the core holding of Pickett and Shelp. As noted, the French text of article 1001 provides that, when an heir dies before accepting or rejecting a succession, "*ses heritiers peuvent l'accepter de son chef.*" Although this last passage was originally translated as "his heirs shall have a right to accept it *under him*," it should more appropriately be read as "his heirs may accept it *under his authority.*"[17] As noted, the core holding of Pickett and Shelp makes *1005 this more correct translation controlling, so there is no merit to the Commissioner's alternate theory.

Based on the foregoing history, commentators, and logic, we hold that article 1007 does allow for the renunciation of a succession by the heirs of an heir on her behalf. Article 84 of the Digest of 1808 was clearly intended to reproduce all of the substance of article 781 of the Code Napoleon, and the omission of the final instance of "repudiate" was likely an inadvertent side effect of the streamlining of the sentence. Every commentator who has considered the issue has apparently assumed this to be the case, no doubt because it is the only interpretation that makes any sense in the light of the

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17. In the juridical context, "*de son chef*" = "under his right." Harper-Collins-Robert French ≈ English English ≈ French Dictionary at 117 (2d ed. 1990).

statutory framework.

Because Louisiana law does allow for the renunciation of a succession by the heirs of an heir on her behalf, the renunciation in this case was valid to pass an interest under state law. The district court's ruling that it was not was in error, and we reverse accordingly.

C

Even conceding this point, however, the Commissioner next argues that the renunciation in this case was nonetheless not a qualified disclaimer because Sammie Delaune had accepted the benefits of Jack's succession prior to her death. Based on the Service's own regulations and letter rulings, we find absolutely no merit to this argument.

As noted, § 2518(b)(3) requires that the disclaimant not have accepted the benefits of the interest in order for a disclaimer to be qualified for federal estate tax purposes. The Commissioner argues that Sammie Delaune accepted the benefits of Jack's succession by allowing her expenses to be paid out of a community property account and by allowing the interest on the succession to accumulate therein.

Under Treas. Reg. § 25.2518-2(d), "[a]cceptance [of benefits for purposes of § 2518(b)(3)] is manifested by an affirmative act which is consistent with ownership of the interest in property." See also Estate of Monroe, 124 F. 3d at 705. Even if William Delaune's actions in this

case may be somehow attributed to Sammie,[18] there seems little doubt that the instances cited by the Commissioner do not constitute "affirmative act[s] consistent with ownership." Simply put, it was not "consistent with ownership" of Jack's succession for Sammie to pay her own expenses from funds in a joint community property account to which she had an equal right,[19] nor was it "an affirmative act" for Sammie passively to "accept" routine interest accrual.

The Commissioner is not wholly unaware of the legally curious nature of his position in the light of his own regulation, and he attempted at oral argument to disavow its binding authority. As we recently held in Estate of McLendon v. Commissioner of Internal Revenue, 135 F. 3d 1017, 1024 (5th Cir. 1998), however, "the Commissioner will be held to his published rulings in areas where the law is unclear, and may not depart from them in individual cases." Although the issue in McLendon concerned a revenue ruling, its rule applies a fortiori in the case of a bona fide treasury regulation, and the Commissioner may not escape the effect of Treas.

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18. An attribution we have some difficulty in swallowing, as William Delaune does not appear to have had any legal authority to act on Sammie's behalf.

19. This is particularly so in the light of the fact that Sammie's expenses undisputedly never exceeded even her portion of the income from the community's property, and the fact that the Commissioner has been consistently deferential towards withdrawals from joint accounts in his own private letter rulings in this area. See, e.g., T.A.M. 86-19-002.

Reg. § 25.2518-2(d) on the admittedly murky question posed by this case. Indeed, we are a little perturbed that he would even try.

Because we find that the Commissioner's instances of purported acceptance do not meet the "affirmative ownership act" standard established in his own regulation, we conclude that Sammie had not accepted the benefits of Jack's succession prior to her death. In the light of our earlier finding that the February 27 renunciation was effective to pass an interest under Louisiana law, we *1006 therefore conclude that it was a qualified disclaimer for federal estate tax purposes, and that the declaration of deficiencies was in error.

D

Having held that the declaration of deficiencies was in error, it only remains to be decided how much the Delaunes may recover in this case. As noted, only the estate of Sammie Delaune and nine of her fourteen heirs have sued for a refund. They request, however, that the entire amount of the deficiency be remitted to their custody.

Under I.R.C. § 6402(a), a refund may only be obtained by the taxpayer who made the overpayment. As other circuits have construed this provision in the context of refund actions, it means that standing is limited to the party or parties who have at least arguably or derivatively made an actual overpayment, such that they have a financial interest in the litigation. See Atlas Hotels, Inc. v. United States, 140 F. 3d 1245, 1998 WL 154465, *2 (9th Cir. 1998); Estate of Fink v. United States, 852 F. 2d 153,

155 (6th Cir. 1988) (both citing Bruce v. United States, 759 F. 2d 755, 758- 59 (9th Cir. 1985)); cf. First National Bank of Fort Worth v. United States, 633 F. 2d 1168, 1171 (5th Cir. 1981) (quoting a district court predecessor to Bruce, Scanlon v. United States, 330 F. Supp. 269 (E.D. Mich.1971), approvingly in a related context); Thomasville Automotive Parts, Inc. v. United States, 609 F. 2d 1136, 1137 (5th Cir. 1980) (noting that § 6402(a) creates a right of recovery only in the case of an overpayment).

We agree with our sister circuits on this point, and further find that a necessary corollary to their rule is that any party's standing to seek a refund in a given case is limited to the amount of his own overpayment. Cf. United States v. Elam, 112 F. 3d 1036, 1038 (9th Cir. 1997) ("Spouses who file a joint return have separate interests in any overpayment [recoverable under § 6402(a)], the interest of each depending upon his or her relative contribution to the overpaid tax.") In this case, it is undisputed that the parties before this court did not make payment on the entire deficiency. Their recovery is therefore limited to the amounts that they paid, which we find to be $75,994 in total.

V

For the foregoing reasons, we REVERSE the judgment of the district court and RENDER for the Delaunes in the amount of $75,994.

REVERSED and RENDERED.

II. FIFTH CIRCUIT DENIAL OF PETITION FOR PANEL REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED

No. 97-30385

AUG 26 1998
CHARLES R. FULBRUGE III
CLERK

SAMMIE BARMAN DELAUNE, Estate; DENISE LOVELESS, Co- Executors and Transferees of the Estate of Sammie Barman Delaune; MAE ACY AMEDEE, Co-Executors and Transferees of Estate of Sammie Barman Delaune; WILLIAM R SMITH, JR., Transferees of the Estate of Sammie Barman Delaune; PHYLLIS ROBIRA ZAPP, Transferees of the Estate of Sammie Barman Delaune; BERTHA THOMAS, Transferees of the Estate of Sammie Barman Delaune; JANF LEE VAN REENEN, Transferees of the Estate of Sammie Barman Delaune; JOYCE B METCALF, Transferees of the Estate of Sammie Barman Delaune; PEGGY ANN GEILER, Transferees of the Estate of Sammie Barman Delaune; SAMUEL BUCKMASTER, JR, Transferees of the Estate of Sammie Barman Delaune

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

---

ON PETITION FOR REHEARING

Before WISDOM, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

(s) E. Grady Jolly
United States Circuit Judge

REHG-2

CLERK'S NOTE
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

III. FIFTH CIRCUIT GRANT OF APPELLEE'S MOTION TO AMEND COURT'S OPINION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED

No. 97-30385

OCT 12 1998
CHARLES R. FULBRUGE III
CLERK

SAMMIE BARMAN DELAUNE, Estate; DENISE LOVELESS, Co- Executors and Transferees of the Estate of Sammie Barman Delaune; MAE ACY AMEDEE, Co-Executors and Transferees of Estate of Sammie Barman Delaune; WILLIAM R SMITH, JR., Transferees of the Estate of Sammie Barman Delaune; PHYLLIS ROBIRA ZAPP, Transferees of the Estate of Sammie Barman Delaune; BERTHA THOMAS, Transferees of the Estate of Sammie Barman Delaune; JANE LEE VAN REENEN, Transferees of the Estate of Sammie Barman Delaune; JOYCE B METCALF, Transferees of the Estate of Sammie Barman Delaune; PEGGY ANN GEILER, Transferees of the Estate of Sammie Barman Delaune; SAMUEL BUCKMASTER, JR, Transferees of the Estate of Sammie Barman Delaune

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

---

Before WISDOM, JOLLY and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee to recall the mandate is GRANTED.

IT IS FURTHER ORDERED that the motion of appellee to amend the court's opinion filed June 29, 1998, to reflect that a total refund would be due to taxpayers in the amount of $90,783.35 is GRANTED.

IV. STATUTES INVOLVED

UNITED STATES CODE ANNOTATED
TITLE 26. INTERNAL REVENUE CODE
SUBTITLE B--ESTATE AND GIFT TAXES
CHAPTER 11--ESTATE TAX
SUBCHAPTER A--ESTATES OF CITIZENS OR RESIDENTS
PART I--TAX IMPOSED

§ 2001: IMPOSITION AND RATE OF TAX

(a) Imposition.--A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

* * *

§ 2002: LIABILITY FOR PAYMENT

Except as provided in section 2210, the tax imposed by this chapter shall be paid by the executor.

SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 64--COLLECTION
SUBCHAPTER C--LIEN FOR TAXES
PART II. LIENS

§ 6324: SPECIAL LIENS FOR ESTATE AND GIFT TAXES

(a) Liens for estate tax.--Except as otherwise provided in subsection (c)--

(1) Upon gross estate.--Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes

unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(2) **Liability of transferees and others.**--If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property transferred by (or transferred by a transferee of) such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, to a purchaser or holder of a security interest shall be divested of the lien provided in paragraph (1) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, or transferee of any such person, except any part transferred to a purchaser or a holder of a security interest.

(3) **Continuance after discharge of fiduciary.**--The provisions of section 2204 (relating to discharge of fiduciary from personal liability) shall not operate as a

release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless such part of the gross estate (or any interest therein) has been transferred to a purchaser or a holder of a security interest, in which case such part (or such interest) shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser or holder of a security interest, by the heirs, legatees, devisees, or distributees.

* * *

CHAPTER 65--ABATEMENTS, CREDITS, AND REFUNDS

SUBCHAPTER A--PROCEDURE IN GENERAL

§ 6402: AUTHORITY TO MAKE CREDITS OR REFUNDS

(a) **General rule.**--In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d) and (e), refund any balance to such person.

* * *

CHAPTER 66--LIMITATIONS

SUBCHAPTER B--LIMITATIONS ON CREDIT OR

REFUND

§ 6511: LIMITATIONS ON CREDIT OR REFUND

(a) Period of limitation on filing claim.--Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

* * *

CHAPTER 71--TRANSFEREES AND FIDUCIARIES

§ 6901: TRANSFERRED ASSETS

(a) Method of collection.--The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, estate, and gift taxes.--

(A) Transferees.--The liability, at law or in equity, of a transferee of property--

(i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes),

(ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes), or

(iii) of a donor in the case of a tax imposed by chapter 12 (relating to gift taxes),

in respect of the tax imposed by subtitle A or B.

(B) **Fiduciaries.**--The liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of the payment of any tax described in subparagraph (A) from the estate of the taxpayer, the decedent, or the donor, as the case may be.

(2) **Other taxes.**--The liability, at law or in equity of a transferee of property of any person liable in respect of any tax imposed by this title (other than a tax imposed by subtitle A or B), but only if such liability arises on the liquidation of a partnership or corporation, or on a reorganization within the meaning of section 368(a).

(b) **Liability.**--Any liability referred to in subsection (a) may be either as to the amount of tax shown on a return or as to any deficiency or underpayment of any tax.

* * *

CHAPTER 76--JUDICIAL PROCEEDINGS
SUBCHAPTER B--PROCEEDINGS BY TAXPAYERS AND THIRD PARTIES

§ 7422: CIVIL ACTIONS FOR REFUND

(a) **No suit prior to filing claim for refund.**--No suit

or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * *

CHAPTER 79--DEFINITIONS

§ 7701: DEFINITIONS

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof--

* * *

(14) **Taxpayer.**--The term "taxpayer" means any person subject to any internal revenue tax.

* * *

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 81--SUPREME COURT

§ 1254: COURTS OF APPEALS; CERTIORARI;

CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

CHAPTER 85--DISTRICT COURTS; JURISDICTION

§ 1340: INTERNAL REVENUE; CUSTOMS DUTIES

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade.

§ 1346: UNITED STATES AS DEFENDANT

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any

penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * *

V. CERTIFICATE OF ASSESSMENTS AND PAYMENTS

United States of America
Department of the Treasury
Internal Revenue Service

Date: September 29, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: is a true copy of the Certificate of Assessments Payments, Form 4340, on Sammie Barman Delaune Estate, Denise Loveless, 1632 Dahlia Street, Baton Rouge, Louisiana 70808, pertaining to Form 706 for the tax year ended 0000, consisting of one page

under the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

(s) S. Christophe
Sheila Christophe
Chief, Advisory Unit
Internal Revenue Service
New Orleans District

GOVERNMENT
EXHIBIT
22

Form 2866 (Rev. 12-92)

Certificate of Assessments and Payments

Name of Taxpayer	Address *(Number, street, city, and state)*	EIN or SSN
Sammie Barman Delaune Estate Denise Loveless	1632 Dahlia Street Baton Rouge, Louisiana 70808	438-68-0547V 706

Date *(a)*	Explanation of Transactions *(b)*	Assessment *(Abatement)* *(c)*	Credit *(Credit Reversal)* *(d)*	Balance *(e)*	DLN or Account Number *(f)*	23C Date *(g)*	Period Ending *(h)*
12/07/87	Return Filed & Tax Liability Assessed	$153,563.08					0000
10/26/87	Remittance with Return		$153,563.08				
02/25/91	Additional Tax or Deficiency Assessment	120,001.83					
02/25/91	Manually Assessed Interest	49,755.89					
09/30/95	Accrued FTP	30,000.45					
09/30/95	Accrued Interest	79,194.12					
				$278,952.29			

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Director *(required for certification)*	Location	Date
Bobby L. Pendleton, Chief, Special Procedures	New Orleans	09/30/95

Form 43 (Rev. 7-80) *Use and issue first "Rev. 7-74"* *U.S. Government Office: 1988—202-894/72424 Department of the Treasury - Internal Revenue Service

BEST AVAILABLE COPY

PAGE NO-0001 IRS EMPLOYEE 4920603594

DATE REQUESTED 05-26-94 PRINT DATE 05-27-94

FORM NUMBER: 706 TAX PERIOD: 0000

TAXPAYER IDENTIFICATION NUMBER:
438-68-0547V

SAMMIE BARMAN DELAUNE ESTATE
DENISE LOVELESS
1632 DAHLIA ST
BATON ROUGE LA 70808-8823-321

<<<<POWER OF ATTORNEY/TAX INFORMATION AUTHORIZATION (POA/TIA) ON FILE>>>>

--- ANY MINUS BELOW SIGNIFIES A CREDIT AMOUNT ---

ACCOUNT BALANCE:	169,757.72	
ACCRUED INTEREST:	51,651.17	AS OF 06-06-94
ACCRUED PENALTY:	30,000.46	AS OF 06-06-94
ACCOUNT BALANCE PLUS ACCRUALS:	251,409.35	

TAX PER TAXPAYER: 153,563.08

10-26-87 RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER)

12-07-87 PROCESSING DATE

TRANSACTIONS

CODE	EXPLANATION	DATE	MONEY AMOUNT (IF APPLICABLE)
150	RETURN FILED AND TAX ASSESSED	12-07-87	153,563.08
610	PAYMENT WITH RETURN	10-26-87	153,563.08-
960	RECEIVED POA/TIA	10-26-87	
976	AMENDED OR DUPLICATE RETURN FILED	05-18-88	0.00
300	ADDITIONAL TAX ASSESSED BY EXAMINATION	01-29-90	0.00
300	ADDITIONAL TAX ASSESSED BY EXAMINATION	03-25-91	0.00
300	ADDITIONAL TAX ASSESSED BY		

	EXAMINATION	02-25-91	120,001.83
190	INTEREST		
	ASSESSED	02-25-91	49,755.89
300	ADDITIONAL TAX		
	ASSESSED BY		
	EXAMINATION	08-23-93	0.00

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified, is a true and complete transcript for the period stated of all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification.

Signature of Director

(s)Nina McCraw, for

Date

060294

Supreme Court, U.S.

98 890 NOV 23 1998

OFFICE OF THE CLERK

Docket No.

UNITED STATES SUPREME COURT
OCTOBER 1998 TERM

SAMMIE BARMAN DELAUNE, Estate; DENISE LOVELESS, Co-Executors and Transferees of the Estate of Sammie Barman Delaune; MAE ACY AMEDEE, Co-Executors and Transferees of the Estate of Sammie Barman Delaune; WILLIAM R. SMITH, JR., Transferees of the Estate of Sammie Barman Delaune; PHYLLIS ROBIRA ZAPP, Transferees of the Estate of Sammie Barman Delaune; BERTHA THOMAS, Transferees of the Estate of Sammie Barman Delaune; JANE LEE VAN REENEN, Transferees of the Estate of Sammie Barman Delaune; JOYCE B. METCALF, Transferees of the Estate of Sammie Barman Delaune; PEGGY ANN GEILER, Transferees of the Estate of Sammie Barman Delaune; SAMUEL BUCKMASTER, JR., Transferees of the Estate of Sammie Barman Delaune

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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9PP

VI. District Court Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ESTATE OF SAMMIE BARMAN DELAUNE, ET AL

CIVIL ACTION

VERSUS

NO. 94-416-A

UNITED STATES OF AMERICA

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter came for bench trial on November 4, 1996. After carefully considering the evidence and the briefs filed by the parties, the court now renders its findings of fact and conclusions of law in accordance with Fed. Rule Civ. P. 52(a).

Findings of Fact

A. In the pretrial order, the parties entered into the following stipulations of fact:

1. Sammie Barman Delaune was married to Jack Delaune and they had no children. The couple lived in Ascension Parish, Louisiana.

2. Jack died on May 31, 1986. His will left his entire estate, less $3000 in special bequests, to his wife, Sammie.

[*2] 3. On January 14, 1987, Sammie met with the

attorneys representing the executor of Jack's succession and discussed changing her will and renouncing Jack's succession.

4. Sammie died on January 26, 1987.

5. Sammie's will left her entire estate, except $3,000 in special bequests, to Jack. Because Jack predeceased Sammie, that legacy lapsed and all but $6,000 of their combined net successions would pass to Sammie's heirs under Louisiana's laws of intestacy.

6. William P. Delaune, an heir of Jack and executor of his succession, filed a state action in the Twenty-third Judicial District Court on February 6, 1987, alleging that Sammie's act instructing the attorneys to draft the renunciation documents created a legally enforceable obligation in favor of Jack's heirs. He contended this obligation was enforceable against Sammie's succession for Jack's entire bequest to her. A Rule to Show Cause hearing was held and a judgment was signed on February 27, 1987 declaring that Sammie had renounced a portion of the bequest from Jack equal to two-sevenths of their combined net estates. This judgment was signed within nine months of Jack's death.

7. Sammie's co-executors did not accept any income or other benefit from Jack's succession in the period between Sammie's death and February 27, 1987.

[*3] 8. Sammie's succession filed a United States Estate Tax Return on October 26, 1987, and filed an Amended United States Estate Tax Return on May 16, 1988, correcting an unrelated error and claiming a refund of $11,453.63.

9. On audit, the Service accepted the $11,453.63 refund shown on the amended return, but made a deficiency assessment after rejecting the alleged disclaimer and the legal claim of Jack's relatives. The Service calculated that Sammie's succession owed $146,727.53 in estate taxes and interest, after reducing the assessed deficiency by the $11,453.63 due the estate.

10. Sammie's succession and its transferees paid the assessed deficiency of $146,727.53 to the Service on November 28, 1990.

11. On November 20,1992, plaintiffs filed a Claim for Refund and Request for Abatement with the Service. This claim sought a refund for the $11,543.63 approved on audit, the $146,727.53 additional taxes and interest paid, interest on the overpayments from the date paid until the date refunded, the tax savings from the additional deduction for the costs of prosecuting the Claim for Refund, and any other sums due plaintiffs.

12. In a letter dated July 23, 1993, the Service denied the Claim for Refund.

B. After considering the evidence, the court additionally renders the following findings of fact:

13. Although Sammie Delaune died in a hospital, she and her husband both resided in a nursing home during a period before their respective deaths.

[*4] 14. Bill Delaune was Jack Delaune's brother and before Jack's death, he paid the expenses of both Jack and Sammie.

15. Subsequent to Jack's death, Bill was named

executor of his succession.

16. Subsequent to Jack's death, Bill Delaune issued checks drawn on a joint account in the names of Jack and Bill Delaune for the payment of Sammie Delaune's expenses while in the nursing home. The funds in the account were all community property and Jack's undivided interest in the account was a part of his succession. This was the same account Bill had been using prior to Jack's death to pay living expenses of Jack and Sammie.

Conclusions of Law

1. This court has subject matter jurisdiction pursuant to 28 U.S.C. §1331.

2. The burden of proof in litigation of tax matters lies with the taxpayer, and the taxpayer has the burden of going forward with the evidence as well as the ultimate burden of persuasion. See **Helvering v. Taylor**, 293 U.S. 507, 515 (1935); **Portillo v. Commissioner**, 932 F.2d 1128, 1133 (5th Cir. 1991).

3. Plaintiffs first contend that they are entitled to the refund because there was a valid disclaimer of Sammie Delaune's interest in the property of her husband's succession. A qualified disclaimer under 26 U.S.C. § 2518 (b) must be a written irrevocable and unqualified refusal to accept an interest in property which is received by the transferor within nine months of the date of the transfer, where the person disclaiming the interest has not accepted the interest in the property, or any of its [*5] benefits, and where the interest in the property passes to someone else without any direction from the person making the

disclaimer.

4. Because no writing existed demonstrating Sammie Delaune's refusal to accept an interest in her husband's succession and because Louisiana law does not provide a method for a deceased individual to renounce an inheritance, Sammie Delaune's oral representations to her attorneys did not effect a valid disclaimer.

5. Plaintiffs claim that Sammie Delaune's succession representatives had the capacity to renounce Jack Delaune's succession on her behalf and that the succession representative's attorneys had the authority to execute such a renunciation on behalf of their clients. To determine whether Sammie Delaune's succession representatives had the capacity to disclaim, the court must look to state law to find a valid renunciation. The requirement that a renunciation be valid under state law is implicit in the language of 26 U.S.C. 2518 (b)(4) which requires that as a result of the refusal, the interest passes without any direction on the part of the person making the disclaimer to either the spouse of the decedent, or to a person other than the person making the disclaimer. State law would dictate whether this requisite element of a qualified disclaimer is satisfied in all cases.

6. Louisiana Civil Code article 1007 provides: "Not only the person who is entitled to an inheritance may accept it, but if he dies before having expressly or tacitly accepted or rejected it, his heir shall have a right *to accept it* under him" (emphasis added). A logical extension of this language which expressly authorizes [*6] an heir to accept an inheritance on behalf of a deceased person is

that Louisiana law does not provide the same authority for an heir's ability to renounce the same on a decedent's behalf.

7. The court finds that neither the executors nor the attorneys representing the heirs had the authority under Louisiana law to disclaim an interest in property on behalf of the heir, Sammie Delaune, after her death. The agreement submitted to the state district court by the succession representatives and heirs of Sammie Delaune did not create a valid judicial renunciation. Only Sammie Delaune had the right under Louisiana law to renounce.

8. Moreover, no qualified disclaimer existed under 26 U.S.C. § 2518 because Sammie Delaune accepted benefits from the allegedly disclaimed property prior to the attempted disclaimer of the property. "Acceptance [of benefits] is manifested by an affirmative act which is consistent with ownership of the interest in property." See Treas. Reg. § 25.2518-2(d). Plaintiffs essentially argue that all of Sammie's expenses paid from account number 15-3814-4, a joint account in Jack and William Delaune's names, were "paid from income generated by her undivided one-half interest in former community property."[1] According to plaintiffs, because Sammie Delaune "never used more than her portion of the funds" she did not accept any of Jack's succession or any income it generated.

[*7] 9. Because the funds in the account were all community property, both Jack Delaune's succession and

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1. Plaintiffs' pre-trial brief p. 12.

Sammie owned an undivided one-half interest. Upon payment by Bill Delaune of Sammie Delaune's expenses, an undivided amount of those payments consisted of the property of Jack Delaune's succession; Sammie Delaune, therefore, received benefits from the allegedly disclaimed property. The acceptance of income and payment of expenses were not segregated or allocated between Sammie Delaune and the succession of her husband during the period at issue.

10. Plaintiffs claim that an additional reason for entitlement to a refund is because Jack Delaune's heirs held a valid enforceable claim against the Estate of Sammie Delaune that would be deductible under 26 U.S.C. §2053. 26 U.S.C. §2053(c) states that when claims against an estate are founded on a promise or agreement, the agreement must be contracted bona fide and for adequate and full consideration in money or money's worth. There are three basic requirements for a claim to be deductible under this provision: (1) the claim against the estate must be allowable by the laws of the jurisdiction where the estate is being administered; (2) the claim must be a personal obligation of the decedent; (3) and the claim must be in existence at the time of the decedent's death. Additionally, where the claim is based on a promise or agreement, the liability must be contracted *bona fide* and for adequate consideration in money or money's worth. Deductions are matters of legislative grace, and the burden is on the taxpayer to demonstrate that any [*8] deduction is within the statutory provisions authorizing the claimed deduction. Interstate Transit

Lines v. Commissioner, 319 U.S. 590 (1943).

11. Sammie Delaune's alleged oral agreement with Jack Delaune that upon the death of the survivor of them, their property would be divided among their heirs did not create a natural obligation deductible from the estate under 26 U.S.C. §2053.

12. The plaintiffs failed to show that Sammie's instruction to the attorneys to draft documents so that she could renounce Jack's succession created a contract for the performance of what might have been a natural obligation, such that Jack's heirs had a claim against Sammie or her succession.

Accordingly, judgment will be entered in favor of defendant and this action will be dismissed.

Baton Rouge, Louisiana, March 7, 1997.

s/John V. Parker

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA